



Muliango v Masaka (Cause 989 of 2018) [2024] KEELRC 2147 (KLR) (30 July 2024) (Ruling)

Neutral citation: [2024] KEELRC 2147 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 989 OF 2018
JK GAKERI, J
JULY 30, 2024

BETWEEN

MONICAIMALI MULIANGO CLAIMANT

AND

CATHERINE MASAKA RESPONDENT

RULING

1. Before the Court for determination is the Applicant’s Chamber Summons dated 26th March, 2024 seeking ORDERS THAT;
 1. Spent.
 2. Spent.
 3. The Honourable Court be pleased to review and/or set aside the decision of the Taxing Officer delivered on 15th March, 2024 certifying costs due to the Claimant from the Respondent at Kshs.156,800/=.
 4. The costs of this application be in the cause.
2. The Chamber Summons is expressed under Section 12 of the *Employment and Labour Relations Court Act*, Section 1A, 1B and 3A of the *Civil Procedure Act* and Rule 11(4) of the Advocates Remuneration Order and is premised on the grounds set out on its face that the judgment delivered in favour of the Claimant/Respondent on 29th May, 2023 was in the sum of Kshs.152,692.31 with costs of the suit and the Taxing Officer delivered a ruling on 15th March, 2024 and taxed the Party and Party Bill of Costs at Kshs.156,875/= in respect of the judgment of Kshs.152,692.31.
3. That the Applicant is aggrieved by the decision of the Taxing Officer.



Respondent/Applicant's submissions

4. As to whether there are sufficient grounds for interfering with the Taxing Officer's ruling delivered on 15th March, 2024, counsel for the Applicant submits that the assessment of costs in all other items except for items 1 and 91 was an error in principle and not justified as the Taxing Officer gave reasons for assessing the instruction fees and did not provide a formula to justify allowing costs for all other items as he gave a blanket statement.
5. That the decision of the Taxing Master failed to set out the circumstances taken into consideration before allowing the costs at Kshs.156,875/= and urges the court to interfere for want of justification.
6. That the failure to give reasons for the decision was contrary to the rules of natural justice on notice and the court ought to interfere with the decision.
7. Counsel prays that the court should direct that the Bill of Costs be taxed by a different Taxing Officer.
8. Reliance was made on the decisions in *County Assembly of Kericho & another V Bett & another Misc. Case No. E001 of 2020* and *Jane Ngetho t/a J.W Ngetho & Co. Advocates V Violet Mukabi Joram Misc. App E005 of 2021* where the court interfered with the Taxing Officer's assessment.

Claimant's submissions

9. Counsel for the Claimant/Respondent submits that he adopts the contents of the Replying Affidavit sworn on 5th April, 2024.
10. Counsel submits that the Applicant has not identified any excessiveness in the assessment of costs and the bill was taxed under Schedule 6(b) of the Advocates Remuneration (Amendment) Order, 2014 and no error of principle has been demonstrated.
11. Counsel submits that the Taxing Officer provided reasons for the amount arrived at.
12. According to counsel, the instant application is a waste of the court's time and a ploy by the Applicant to secure stay of execution orders through the back door as no reason has been advanced to justify a re-taxation of the bill by another Taxing Master and the allegation of unjust enrichment lacks justification as no item has been isolated.
13. Counsel urges the court to dismiss the application.
14. After careful consideration of the Notice of Motion and submissions by counsel, the singular issue for determination is whether the Applicant's Notice of Motion is merited.
15. In order to contextualize the application herein, it is essential to highlight the history of the suit.
16. It is common ground that the suit was filed on 19th June, 2018 under Certificate of Urgency and the court directed service of the application on even date and a ruling on provision of security by the Respondent was delivered on 17th May, 2019 and after a long delay, the suit was heard on 27th September, 2022. However, the Respondent's case could not be heard as the witness was unavailable owing to power of fluctuations in Zimbabwe and hearing was adjourned to 13th October, 2022 but could not take place due to power challenges in Zimbabwe and the Claimant's counsel had no objection and hearing was adjourned to 1st February, 2023 on which day hearing was scheduled to commence at 10.35 am at which time counsel for the Respondent urged the court to adopt the Respondent's witness statement as the witness was unavailable to testify but counsel for the Claimant objected and after hearing both counsels on the issue, the court ruled out that the Respondent's witness



would not be adopted and the Respondent's case was closed and directions on the filing of submissions given.

17. Judgment was delivered on 29th May, 2023.
18. By an application dated 14th June, 2023, the Respondent/Applicant sought various orders including stay of execution, review, variation or setting aside of the Judgment and by a ruling delivered on 2nd November, 2023, the court dismissed the Notice of Motion.
19. On 23rd November, 2023, the Claimant/Respondent filed the Party and Party Bill of Costs and by a ruling delivered on 15th March, 2023, the Taxing Officer taxed the Bill of Costs at Kshs.156,875.00. This ruling is the subject matter of the instant application.
20. The applicant states that she is aggrieved by the decision of the Taxing Officer and prays for a review of the decision and as correctly submitted by the Claimant/Respondent's counsel, the Applicant has not faulted any item in the Bill of Costs.
21. The principles that govern the challenge of Bill of Costs by a dissatisfied party are well settled.
22. It is by way of a reference pursuant to the provisions of the Advocates Remuneration Order.
23. In *Donholm Rahisi Stores (firm) V E.A Portland Cement Ltd (2005) eKLR*, Waweru J. stated as follows;

“Taxation of costs whether those costs be between party and party or between advocate and client is a special jurisdiction reserved to the Taxing Officer by the Advocates Remuneration Order. The court will not be drawn into the arena of taxation except by way of reference from a decision on taxation made under Rule 11 of the Advocates Remuneration Order.”
24. Ringera J expressed similar sentiments in *Machira & Co. Advocates V Magugu (2002) 2 EA 248*.
25. Under Rule 10 of the Remuneration Order, the Taxing Officer for the taxation of Bills under this Order shall be the Registrar or a District or Deputy Registrar of the High Court or such other qualified officer as the Chief Justice may in writing appoint, except that in respect of bill under Schedule 4 to the Order, the Taxing Officer shall be the Registrar of trade marks or any Deputy or Assistant Registrar of trade marks.
26. Under Rule 11 of the Remuneration Order;
 1. Should any party object to the decision of the Taxing Officer, he may within 14 days after the decision give notice in writing to the Taxing Officer of the items of taxation to which he objects.
 2. The Taxing Officer shall forthwith record and forward to the objector the reasons for the decision on those items and the objector may within fourteen days from the receipt of the reasons apply to a judge by Chamber Summons, which shall be served on all the parties concerned setting out the grounds of his objection.
27. Judicial authority is unambiguous that failure by the Taxing Officer to give reasons is not fatal to the reference as they are ordinarily contained in the ruling itself. See *Ahmed Nassir V National Bank of Kenya (2006) EA* and *Bernard Gichobi Njira V Kanini Njira Kathendu & another (2015) eKLR*.
28. Although Rule 11 is not couched in mandatory terms in stricto sensu, it is a step the framers of the Advocates Remuneration Order considered necessary to give the Taxing Officer an opportunity to justify the taxation as required by the objector and if dissatisfied to file a reference in court.



29. The reasons for the decision by the Taxing Officer, additionally guide the court in understanding why the Taxing Officer so held.
30. In the instant case, the Applicant invoked the provisions of Rule II of the Advocates Remuneration Order vide letter dated 22nd March, 2024 to the Deputy Registrar and did not object to the decisions of the Taxing Officer on the premise that the costs were excessive and not drawn to scale and sought reasons for the award. There is no evidence on record to show that the letter was indeed responded to or that the reasons were provided. The instant Chamber Summons is dated 26th March, 2024.
31. As regards interference with the decision of the Taxing Officer, the law is well settled.
32. In Republic V Ministry of Agriculture & 2 others Ex Parte Muchiri W. Njuguna & others (2006) eKLR, Ojwang J. (As he then was) held inter alia;

“The court cannot interfere with the Taxing Officer’s decision on taxation unless it is shown that either the decision was based on an erroneous principle or the fee awarded was manifestly excessive as to justify an interference that it was based in an error of principle. Of course, it would be an error of principle to take into account irrelevant factors or to omit to consider relevant facts . . . The taxation of cost is not a mathematic exercise. It is entirely a matter of opinion based on experience. A court will not interfere with the award of a taxing officer particularly where he is an officer of great experience, merely because it thinks the award somewhat too high or too low; it will only interfere if it thinks the award so high or so low as to amount to an injustice to one party or the other.”
33. The Court of Appeal expressed similar sentiments in Kipkorir Tito & Kiara Advocates V Deposit Protection Fund Board (2005) eKLR.
34. In the instant reference, it behoved the Applicant to demonstrate that the Taxing Officer either committed a specific or several errors of principle or the amount taxed was manifestly excessive to amount to an injustice on its part.
35. The grounds on which the Chamber Summons is premised make no reference or mention of any error of principle allegedly committed by the Taxing Officer.
36. The Applicant makes no mention of what the Taxing Officer may have taken onto consideration or omitted to take into consideration in any circumstance and tendered no evidence of having objected to any of the items itemized by the Decree holder’s Party and Party Bill of Costs dated 2nd June, 2023.
37. The Applicant’s failure to isolate the specific items under contestation would appear to suggest that the Taxing Officer got everything wrong which is not the case as no such evidence has been provided.
38. In her submissions, counsel for the Applicant states that the Taxing Officer did not justify assessment of instruction fees and provided no formulae of how other items were arrived at as the Taxing Officer merely stated;

“The other items are drawn to scale and I shall not upset them save for the item on VAT which is taxed off all circumstances considered.”
39. According to counsel, the Taxing Officer ought to have enumerated the circumstances he considered.
40. As this is a reference, it is incumbent upon the Applicant to set out the circumstances the Taxing Officer ought to have considered but did not show that an error of principle was committed.



41. The Applicant provided no demonstrable reason why the costs taxed by the Taxing Officer are excessive or not drawn to scale.
42. In other words, the argument is not supported by any computation to show the excessiveness of the costs. For instance on instructions, the Decree holder had charged the sum of Ksh.75,000/= and the Taxing Officer taxed off Ksh.35,000.
43. As regards getting up fees, the sum of Ksh.10,000 was taxed off.
44. In the court's view, the fact that the Taxing Officer is explicit that the other items were drawn to scale was sufficient for purposes of justifying the non-interference with the items.
45. Finally, in Daniel Toroitich Arap Moi V Mwangi Stephen Muriithi & another (2014) eKLR, the Court of Appeal stated as follows;

“Submissions are generally parties “marketing language” each side endeavouring to convince the court that its case is the better one. Submissions we reiterate do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented . . .”

46. Similarly, submissions are not binding on the court as held in Imperial Bank Ltd V Bakari Juma Bench Pende (2016) eKLR.
47. For the foregoing reasons, it is the finding of the court that the Applicant's Chamber Summons dated 26th March, 2024 is unmerited and it is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30TH DAY OF JULY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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